

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

February 3, 2006

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: June 27, 2005

Case Number: TSO-0255

This Decision concerns the eligibility of xxxxxxxxxxxxxxxxxxxxxxxxx (hereinafter "the individual") for continued access authorization. The regulations governing the individual's eligibility are set forth at 10 C.F.R. Part 710, "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." This Decision will consider whether, based on the testimony and other evidence presented in this proceeding, the individual should be granted an access authorization. For the reasons detailed below, it is my decision that the individual should not be granted an access authorization.

I. BACKGROUND

On June 17, 2005 the DOE issued a notification letter indicating that the individual was arrested four times for driving under the influence of alcohol (DUI). The last two arrests were in 1998. The notification letter further indicated that the individual was evaluated by a DOE consulting psychiatrist. The consulting psychiatrist's November 25, 2004 report, DOE Exhibit No. 15, stated that the individual suffers from alcohol abuse. The notification letter concludes that the diagnosis of alcohol abuse raises a security concern under 10 C.F.R. §710.8(j) (Criterion J).

In the notification letter, the Manager informed the individual that he was entitled to a hearing before a hearing officer in order to respond to the information contained in the notification letter. The individual requested a hearing. I was appointed to serve as the hearing officer. In accordance with 10 C.F.R. § 710.25(e) and (g), I convened a hearing in this matter (the hearing).

The individual raised three factors that he believes mitigate the DOE security concern and should provide a basis for granting him an access authorization. First, he indicated that he has reduced his consumption of alcohol and he believes his current level of alcohol does not present a security concern. Transcript of Hearing (Tr.) at 8. Second, he indicated a willingness to follow any rehabilitation and monitoring program specified by the DOE. Tr. at 7. Finally, he has been employed by the DOE for three years and his job performance has always been good. Tr. at 7.

The individual testified on his own behalf. He also called his wife and a union official to testify. The DOE called the DOE consulting psychologist.¹

II. HEARING

A. The DOE Consulting Psychologist

The DOE consulting psychologist testified that the individual has a family history of alcohol misuse and that the individual started drinking when he was 14 years old. Tr. at 14. She testified that the individual told her that he currently consumes three or four beers a night on the week end and one or two beers after work during the week. Tr. at 15. She believes that his reported level of alcohol use is excessive. She testified that the National Institute of Health's definition of excessive for men is consuming more than "14 drinks per week, or more than four drinks in a single day, at least once a month." Tr. at 16. She also testified that the individual prefers to drink alone and that an individual drinking alone is less likely to regulate the amount of alcohol which he consumes. Tr. at 17.

The DOE consulting psychologist testified that the individual's two DUI arrests in 1998,² his consumption of alcohol at the age of 14 and his reported level of alcohol use indicates that the individual suffers from alcohol abuse. Tr. at 29. The DOE consulting psychologist testified that she does not believe the individual is rehabilitated or reformed. Tr. at 35. She believes that in order to demonstrate rehabilitation, the individual should abstain from alcohol for two years and participate in a treatment program.³ Tr. at 35.

B. The Individual

The individual indicated that he agrees with the DOE consulting psychologist diagnosis of alcohol abuse. Tr. at 39 & 70. He testified that he has taken steps to reduce his consumption of alcohol. Tr. at 74. He stated that in the last week he had three or four beers on Sunday and he had a "couple of beers" twice during the week. Tr. at 80. He indicated that he intends to continue to reduce his consumption of alcohol

¹ Due to health problems, the DOE consulting psychiatrist was unavailable for the hearing. Therefore, after I was appointed the hearing officer the individual was examined by a DOE consulting psychologist. Her September 20, 2005 report made findings of problems with alcohol that were similar to the report of the DOE consulting psychiatrist. Her report also diagnosed the individual as suffering from alcohol abuse. DOE exhibit #6.

² The individual testified that he believes he has only received three DUIs. He testified that two of the DUIs were in 1998 and one was in 1992. Tr. at 32 and 33.

³ At the Hearing the individual submitted laboratory blood test results dated July 15, 2005. Individual's Exhibit No. 1. He asked the DOE consulting psychologist whether those laboratory results included liver enzyme tests. She testified that she was unable to find any liver enzyme levels in the test results. Tr. at 45.

to the point of total abstinence. Tr. at 87. The individual is not currently participating in any type of rehabilitation program. Tr. at 91.

The individual also testified that since receiving the DUIs in 1998 he has never driven after he has consumed alcohol. Tr. at 84. Further he stated that he has never gone to work while under the influence of alcohol, nor has he ever gone to work with a hang over. Tr. at 85. Finally, he has worked for a DOE contractor for three years without any performance problems. Tr. at 7.

C. The Individual's Wife

The individual wife testified that she and the individual have been married for 36 years and that they have three children. Tr. at 47. During most of her husband's non-work hours, she and her husband are together at home. Tr. at 48. The individual's wife testified that she does not consume alcohol and that the individual consumes one or two beers every other day during the week. Tr. at 52. On the weekend he drinks three beers a day. Tr. at 53. She testified that he usually drinks with neighbors who visit their home or with his daughter who lives in their home. Tr. at 53. She testified that the individual's consumption of alcohol has never caused any problems in their marriage. Tr. at 50.

The individual's wife testified that after his 1998 arrests for DUI, she and the individual discussed his alcohol use. They concluded that he had to stop getting into trouble. After those discussions the individual reduced his consumption of alcohol and completely stopped driving after he had consumed any alcohol. Tr. at 51. The individual has had no legal or work related problems with alcohol since 1998. Tr. at 49.

She summarized by indicating that the individual has committed to reducing his consumption of alcohol and that he currently is doing very well. Tr. at 56.

D. Union Official

The union official testified that he has known the individual for 12 years. Tr. at 63. He testified that he sees the individual once a month. Tr. at 64. He and the individual have worked together on political campaigns, charitable project and union activities. Tr. at 63. He testified that he has never seen the individual consume alcohol. Tr. at 64.

III. REGULATORY STANDARD

In order to frame my analysis, I believe that it will be useful to discuss briefly the respective requirements imposed by 10 C.F.R. Part 710 upon the individual and the hearing officer.

A. The Individual's Burden of Proof

It is important to bear in mind that a DOE administrative review proceeding under this Part is not a criminal matter, where the government would have the burden of proving the defendant guilty beyond a reasonable doubt. Once a security concern has been raised, the standard in this proceeding places the

burden of proof on the individual to bring forth persuasive evidence concerning his eligibility for access authorization. 10 C.F.R. §§ 710.21(b)(6), 710.27(b), (c), (d).

This burden is designed to protect national security interests. The hearing is "for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization." 10 C.F.R. § 710.21(b)(6). The individual must come forward at the hearing with evidence to convince the DOE that restoring his access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a).

This is not an easy evidentiary burden for the individual to sustain. The regulatory standard implies that there is a presumption against granting or restoring an access authorization. See *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) ("clearly consistent with the national interest" standard for the granting of access authorizations indicates "that security determinations should err, if they must, on the side of denials"); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991) (strong presumption against the issuance of an access authorization). Consequently, it is necessary and appropriate to place the burden of persuasion on the individual in cases involving national security issues. In addition to her own testimony, the individual in these cases is generally expected to bring forward witness testimony and/or other evidence which, taken together, is sufficient to persuade the hearing officer that restoring access authorization is clearly consistent with the national interest. *Personnel Security Hearing (Case No. VSO-0002)*, 24 DOE ¶ 82,752 (1995).

B. Basis for the Hearing Officer's Decision

In a personnel security case under Part 710, it is my role as the hearing officer to issue a decision as to whether granting an access authorization would not endanger the common defense and security and would be clearly consistent with the national interest. 10 C.F.R. §710.27(a). Part 710 generally provides that "[t]he decision as to access authorization is a comprehensive, common-sense judgment, made after consideration of all relevant information, favorable and unfavorable, as to whether the granting of access authorization would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a). I must examine the evidence in light of these requirements, and assess the credibility and demeanor of the witnesses who gave testimony at the hearing.

IV. ANALYSIS

The individual testified that he agrees with the diagnosis of the DOE consulting psychologist. I also agree that her diagnosis is correct. Therefore, it is my role in this case to review the testimony and documents presented by the individual to determine whether the individual has mitigated the Criterion J security concern.

Mitigation of a Criterion J security concern is usually based on a showing of rehabilitation or reformation. The DOE consulting psychologist testified that in order for this individual to demonstrate rehabilitation she believes that he should demonstrate two years of sobriety, participate in alcoholic anonymous (AA) and complete a treatment program. The two year period of sobriety is somewhat longer than the one year normally recommended for rehabilitation from a diagnosis of alcohol abuse. However, the consulting

psychologist pointed out that the individual has a long history of excessive use of alcohol and he started drinking at a very young age (14). She believes both factors indicate a longer period of abstinence is necessary in order to demonstrate rehabilitation.

In order to establish rehabilitation, an individual is usually expected to follow a regime including abstinence and other rehabilitation efforts. Most individuals participate in a 12-step program such as AA and perhaps some one-on-one counseling or therapy. The individual here has admittedly not taken this path. However he offers three factors to support his position that the security concern regarding his alcohol use has been resolved.

First, the individual does not believe that he needs to completely abstain from alcohol use in order to resolve the DOE concern related to his abuse of alcohol. Tr. at 87. He believes that the DOE has a security concern if an individual drinks excessively. He believes that the definition of excessive consumption of alcohol is the one provided by the DOE consulting psychologist - a male who drinks more than 14 alcoholic drinks per week or more than 4 alcoholic drinks in a day. Tr. at 71. He testified that he currently consumes 10 to 12 alcoholic drinks in a week. Tr. at 82. Since his consumption of alcohol is below the excessive level he believes he should be considered within DOE "guidelines" for the use of alcohol.

The diagnosis of alcohol abuse indicates a serious problem. I do not believe that a demonstration that the individual has consumed alcohol moderately for a year resolves the DOE security concern. In any event, the individual has failed to provide reasonable support for his testimony and that of his wife that he has reduced his level of alcohol consumption and is currently consuming less than 14 alcoholic drinks per week. He testified that he consumes alcohol with his family and friends. However, he failed to provide any testimony from family or friends indicating his current level of alcohol consumption. Therefore, I have not been convinced that he does not currently consume alcohol to excess.

The individual's second mitigating argument is that he would be willing to follow any alcohol treatment program specified by the DOE. My role is to review the actual steps an individual has taken to determine whether he has mitigated the DOE security concern. I must make a determination regarding eligibility for access authorization that does not require continued oversight. While conditional grants of access authorization are within the discretion of the Office of Security, it is not within my authority under Part 710 to consider granting this type of security clearance. *Personnel Security Hearing (Case No. TSO-0184)*, 24 DOE ¶ 82,818 (2005).

Finally, the individual believes that the three years he has worked for a DOE contractor without any job performance problems should mitigate the DOE security concern. My consideration here is whether the individual is fit to hold a security clearance. The concern relates to the individual's consumption of alcohol during his off duty hours. There is no question that unsuitable behavior off the job may well present security concerns. His demonstration of good job performance, while important, is not in and of itself sufficient to establish fitness to have an access authorization. Accordingly, the individual's good job performance is not sufficient to mitigate the Criterion J security concern.

V. CONCLUSION

I have concluded that the individual has not mitigated the DOE security concerns under Criterion J of 10 C.F.R. § 710.8. In view of the record before me, I am not persuaded that restoring the individual's

access authorization would not endanger the common defense and security and would be clearly consistent with the national interest. Accordingly, I find that the individual's access authorization should not be restored.

The review procedures applicable to proceedings under Part 710 were revised effective September 11, 2001. 66 Fed. Reg. 47061 (September 11, 2001). Under the revised procedures, the review is performed by an Appeal Panel. 10 C.F.R. § 710.28(b)-(e).

Thomas L. Wieker
Hearing Officer
Office of Hearings and Appeals

Date: February 3, 2006